No. 06-1164

IN THE

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

JEFFREY K. HAYNES
Counsel of Record
BEIER HOWLETT, P.C.
200 E. Long Lake Road,
Suite 110
Bloomfield Hills, MI 48304
(248) 645-9400
Attorneys for Petitioner

PAUL D. CLEMENT
Solicitor General
Counsel of Record
DEPARTMENT OF JUSTICE
Washington, D.C. 20530
(202) 514-2217
Attorneys for Respondent

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

TABLE OF CONTENTS

Page

Relevant Docket Entries 1a

Complaint 4a

Answer 21a

Plaintiff's Brief Concerning Accrual Date of the Take (excerpts) 31a

Defendant's Special Briefing in Response to the Court's Order of 7/7/2004 (excerpts) 37a

Stipulated Facts 41a

In the United States Court of Federal Claims:

10/29/2004	1	Complaint
08/21/2002	9	Answer
12/13/2002	16	Motion by United States for judgment on the pleadings
01/23/2003	21	Response by John R. Sand & Gravel Company to motion for judgment on the pleadings
03/13/2003	34	Supplemental brief by John R. Sand & Gravel Company regarding accrual of a physical taking claim
03/13/2003	35	Supplemental briefing by United States regarding motion for judgment on the pleadings
05/14/2003	38	Motion for partial summary judgment by John R. Sand & Gravel Company
06/27/2003	40	Opinion and order denying United Sates' motion for summary judgment that John R. Sand & Gravel Company's complaint is time barred except with respect to monitoring wells not

		abandoned and still in operation, which is granted
12/01/2003	61	Cross motion and opposition to John R. Sand & Gravel Company's motion for partial summary judgment
02/02/2004	84	Opinion denying Metamora Group's motion to intervene
04/02/2004	117	Opinion granting United States' cross motion for summary judgment with respect to *Lucas* background principles applying to physical takings and denying John R. Sand & Gravel Company's motion for summary judgment
04/08/2004	123	Opinion denying United States Rule 14(b) motion
04/13/2004	126	Opinion denying motion to stay proceedings pending appeal filed by General Motors Corporation, et al
07/09/2004	166	Supplemental brief by John R. Sand & Gravel Company regarding accrual date of the take as May 1998

07/09/2004	167	Supplemental brief by United States suggests John R. Sand & Gravel Company's cause of action accrued in May 1998
07/09/2004	170	Stipulated facts
10/29/2004	182	Opinion directing judgment in favor of United States as to all claims of John R. Sand & Gravel Company

United States Court of Appeals for the Federal Circuit:

08/09/2006	Opinion vacating and remanding judgment of the court of federal claims
11/30/2006	Order denying plaintiff's motion for rehearing en banc

02-509L
In the United States Court of Federal Claims

John R. Sand & Gravel Company,
a Michigan corporation,
Plaintiff,

v.

The United States,
Defendant.

Complaint

Plaintiff John R. Sand & Gravel Company, through its counsel, Beier Howlett, P.C., complains against defendant the United States as follows:

Statement of Claim

1. This is an inverse condemnation action seeking compensation for defendant's physical taking of plaintiff's property.

Parties

2. Plaintiff John R. Sand & Gravel Company is s Michigan corporation that operates a sand and gravel mine in Metamora Township, Lapeer County, Michigan.

3. The United States Environmental Protection Agency ("EPA") is an agency of defendant.

Jurisdiction

4. This court has subject matter jurisdiction because plaintiff's claim against defendant is founded upon the Constitution of the United States and is in excess of $10,000.00. 28 U.S.C. § 1491 (a).

Plaintiff's Sand and Gravel Operations

5. Plaintiff entered into a sand and gravel lease in 1969, a copy of which is attached as Exhibit 1, regarding property in Metamora Township, Lapeer County, Michigan (the "Leased Property"), whose legal description is:

> The east 1/2 of the southwest 1/4 and the west 1/2 of the southeast 1/4, except the south 189 feet of the west 380 feet of the east 820 feet of the southwest 1/4 of the southeast 1/4, section 10, Town 6 North, Range 10 East.

The Leased Property contains 158 acres, more or less. The Leased Property's street address is 1717 Dryden Road, Metamora, Michigan.

6. At the time the lease was entered into, Russell Parrish and Mildred Parrish, husband and wife, owned the Leased Property. Russell and Mildred Parrish are both deceased. The Estate of Russell Parrish, deceased, now owns the Leased Property, except for a parcel within the Leased Property which the Parrishes conveyed to County Transfer Station, Inc. in 1989, subject to plaintiff's sand and gravel lease.

7. The term of the lease is for fifty years, beginning on August 1, 1969 and ending on August 1, 2019.

8. The lease grants plaintiff the exclusive use of the Leased Property to remove and sell sand and stone from the Leased Property:

> ...which premises are hereby leased to the exclusive use of the party of the second part for the purpose of stripping the land, taking out and removing therefrom the marketable stone and sand, which is, or which may hereafter be found on, in or under said land, together with the right to construct or build, and to make all excavations, pits openings, ditches, roadways and other improvements upon the said premises, which are or may become necessary or suitable for removing sand and stone from the said premises.

Exhibit 1, Lease ¶1.

9. Plaintiff entered the lease with the reasonable expectation that, during the term of the lease, it could remove and sell sand and stone from the Leased Property. Plaintiff has removed and sold sand and stone from the Leased Property continuously from the inception of the Lease, except for defendant's taking of plaintiff's property.

10. Plaintiff operates its sand and gravel business by digging naturally occurring sand and gravel, conveying the material to a crushing and wash plant, and crushing, sorting and washing the unconsolidated material into different products, such as 2NS sand, 6A stone, pea gravel, mason sand, fill sand and other products.

11. Plaintiff uses a groundwater well to pump water into a supply pond from which plaintiff draws water for its sand and gravel washing operation.

12. Finished products (washed sand and stone, fill sand and other products) are sold to customers and loaded into customers' trucks that come onto the Leased Property.

EPA Activities on the Leased Property

13. The Metamora Landfill is located on the northern portion of the Leased Property. The Metamora Landfill comprises between 20 and 80 acres.

14. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.*, authorizes the President of the United States to investigate and respond to sites where there have been releases or threatened releases of hazardous substances.

15. Executive Order 12580 delegates to EPA the President's authority to investigate and respond to such sites.

16. On September 21, 1984, EPA, acting under the authority granted by CERCLA, placed the Metamora Landfill on the National Priorities List of sites of environmental contamination.

17. EPA completed a Site Characterization Report for the Metamora Landfill Site (the "Site") in February 1986. EPA completed a Phased Feasibility Study for the Site in August 1986.

18. On September 1, 1986, the Regional Administrator of the EPA signed a Record of Decision ("ROD"), which contains a remedial action plan for areas 1 and 4 of the Site. Area 1 is generally in the south central portion of the Site. Area 4 is generally in the northwest portion of the Site.

19. In March 1989, EPA completed a Remedial Investigation of the Site, which included taking soil samples and installation of monitoring wells. Some of this soil sampling and well installation occurred in areas of the Leased Property that are not within the Site.

20. EPA completed the Feasibility Study of the Site in March 1990.

21. EPA issued a ROD for the final remedial action for the Site in September 1990.

22. During or about 1992, EPA and its agents mobilized on the Leased Property to remove barrels and contaminated material from the Site.

23. During these removal operations, EPA demanded access to the Leased Property to perform the work.

24. During the winter of 1992-1993, EPA and its agents erected fences in plaintiff's plant area, in which are located plaintiff's equipment storage area, surge (supply) pile, crushing and wash plant, and customer access roads. These fences prevented plaintiff from operating its machinery and equipment and selling finished products to customers. Following protests

from plaintiff, EPA relocated the fences to areas outside plaintiff's plant area.

Consent Decree and Final Remedial Design

25. On March 17, 1993, EPA and a group of defendants (sometimes known as the Metamora Landfill Settling PRP Group or "Settling Defendants") entered into a consent decree in the action entitled *United States of America v. BASF-Inmont Corporation*, No. 91-CV-40320-FL (E.D. Mich. March 17, 1993). Plaintiff is not a party to the consent decree. The consent decree was judicially approved. 819 F. Supp. 1001 (E. D. Mich. 1993).

26. In the consent decree, Settling Defendants agreed to perform the remediation of the Site. Settling Defendants have at all times relevant to this action been acting as EPA's representatives to implement the remedy at the Site.

27. Under authority of EPA, Settling Defendants demanded that plaintiff not mine any portion of the Leased Property within fences constructed by EPA and its representatives without prior notice to and approval of EPA and the Settling Defendants.

28. Settling Defendants believed that the continued existence of plaintiff's sand and gravel operation was inconsistent with the effective management of the Site, and that plaintiff's lease should be terminated.

29. On August 28, 1996, EPA amended the ROD. The amendment provides that contaminated soil excavated from a portion of the Site be consolidated

with other waste material from the Site and redeposited on the Site under a cap to be placed over the landfill area.

Administrative Order

30. On December 18, 1996, the Superfund Division of Region 5 of the EPA issued an Administrative Order ("Order"), No. 97-C-379, to plaintiff and Edward W. Evatz, Jr. A copy of the Order is attached as Exhibit 2. The Order became effective on January 8, 1997, 21 days after its issuance.

31. EPA issued a similar Administrative Order to Russell Parrish as the then owner of the Leased Property.

32. In the Order, EPA asserted that the Settling Defendants required access to the Leased Property to implement the EPA's remedial action plan and required plaintiff to comply with the terms of the Consent Decree. Exhibit 2, Order ¶4.m (pages 5-6).

33. EPA ordered plaintiff to grant EPA and its agents, subcontractors, consultants and representatives entry and access to all portions of the Leased Property for all activities that EPA asserted were necessary to complete actions required under the Consent Decree. Exhibit 2, Order ¶6.a (pages 7-8).

34. The activities for which EPA ordered access on the Leased Property include but are not limited to: (1) construction and/or maintenance of existing or new access roads, including roads in and around plaintiff's operations area; (2) construction of the landfill cap; (3)

construction of a groundwater extraction and treatment system; (4) long term operation, maintenance and monitoring of the remedy; and (5) relocation of the County Transfer Station. Exhibit 2, Order ¶6.a (pages 7-8).

35. The long term operation, maintenance and monitoring of the remedy include the collection of groundwater samples from groundwater monitoring wells that are installed or are to be installed at various locations on the Leased Property outside of the Site.

36. The Order:

a. Requires plaintiff to grant access for as long as EPA deems necessary for completion of the remedial action and any additional work. Exhibit 2, Order ¶6.b (page 8).

b. Forbids plaintiff from interfering with or impeding the selected remedy, including access roads, components of the groundwater treatment system and fencing. Exhibit 2, Order ¶6.d (page 8).

c. Requires plaintiff to manage and control surface water runoff and to manage and control the use of groundwater so as not to interfere with the implementation of the selected remedy. Exhibit 2, Order ¶¶6.e, 6.f (page 8).

d. Prohibits plaintiff from interfering with the area containing the landfill cap (the "Area of Institutional Controls") by excavating, grading, filling, drilling, mining, storage, disposal or other construction or development. Exhibit 2, Order ¶6.g (page 8).

37. Plaintiff, upon threat of severe sanctions contained in the Order, agreed to comply with the Order, subject to limited conditions, including that such compliance did not waive plaintiff's claim that its property had been taken. See letter from Haynes to Felitti dated January 7, 1997, attached as Exhibit 3. EPA thereafter removed Edward Evatz Jr. as a respondent.

38. When EPA issued the Order, plaintiff was mining and removing sand and stone from the Area of Institutional Controls.

39. Pursuant to the Order, EPA and the Settling Defendants immediately began work at the Site and on the Leased Property, including running hundreds of gravel trucks carrying fill for the landfill cap through plaintiff's plant area.

40. Disputes arose among EPA, the Settling Defendants and plaintiff relating to plaintiff's compliance with the Order. In particular, plaintiff objected to EPA and Settling Defendants treating plaintiff's Leased Property as open land.

41. Defendant filed a complaint in the U.S. District Court for the Eastern District of Michigan in October 1997, *United States v. John R. Sand & Gravel Co.*, No. 97-75497, seeking an immediate order in aid of access and up to $25,000 per day in civil penalties from plaintiff.

42. Following discovery and negotiations among the parties, the court entered an order enjoining plaintiff from interfering with entry by EPA, its contractors and

representatives onto the Site or the Leased Property. *U.S. v. John R. Sand & Gravel Co.*, No. 97-75497, Order (E.D. Mich. March 23, 1998). A copy of the order is attached as Exhibit 4.

43. In 1999, plaintiff and defendant agreed to entry of an order of judgment in civil action 97-75497 on terms substantially similar to the March 23, 1998 order, except that the order of judgment moves EPA's access route to the landfill area from the center of the Leased Property to a road to be constructed on the west side of the Leased Property. Order of Judgment (E.D. Mich. August 1, 1999), attached as Exhibit 5. The order of judgment preserves plaintiff's taking claim (see pp. 4-5).

44. A substantial portion of the Area of Institutional Controls, including valuable sand and gravel, was free of and remains free of contamination. Other areas of sand and gravel under the landfill cap now underlie contaminated materials redeposited under the landfill cap by EPA and Settling Defendants.

45. The landfill cap as constructed by EPA and Settling Defendants contains several hundred thousand cubic yards of fill material permanently located on top of such sand and gravel.

46. The landfill cap was designed to cover more of the Leased Property than the landfill occupies. See Final Cap Contours figure, attached as Exhibit 6.

47. Several fences erected by EPA and Settling Defendants, on which are hung signs that say "Hazardous Waste Area, Do Not Enter," divide much

of the Leased Property into areas that have no relation to hazardous waste disposal areas in the Metamora Landfill. See Fencing Activities figure, attached as Exhibit 7.

48. Upon information and belief, EPA and Settling Defendants have abandoned several monitoring wells and other wells on the Leased Property outside the Area of Institutional Controls by pulling the well casings and filling the boreholes with grout, cement, or other substances.

49. County Transfer Station has agreed with the Settling Defendants, in consideration of large sums of money paid by the Settling Defendants, to restrict its activities on portions of its parcel to allow construction of the landfill cap, including restrictions on sand and gravel mining and use of groundwater (contrary to plaintiff's leasehold interest).

Count I
Physical Taking -Permanent Occupation

50. Plaintiff incorporates by reference paragraphs 1 through 49.

51. EPA, its agents, and their subcontractors, consultants, or representatives have permanently occupied portions of the Leased Property in order to implement the remedy at the Metamora Landfill, including but not limited to the following:

a. Constructing a cap, together with several hundred thousand yards of fill and contaminated

material, over the landfill area and over valuable sand and gravel.

b. Occupying and excluding plaintiff from the Area of Institutional Controls.

c. Constructing an access road across the west side of the Leased Property from Dryden Road to the landfill area (see portion of property covered by declaration attached as Exhibit 8).

d. Installing groundwater monitoring wells on the Leased Property outside the Area of Institutional Controls.

e. Upon information and belief, abandoning monitoring wells and other wells on the Leased Property outside the Area of Institutional Controls by leaving grout, cement and other substances in the ground.

52. These actions are and will continue to be a permanent physical occupation by defendant of the Leased Property.

53. Defendant's permanent physical occupation of the Leased Property has prevented and will continue to prevent plaintiff from mining and selling sand, stone and gravel from and reclaiming that portion of the Leased Property occupied by the Area of Institutional Controls, the western access road, and the monitoring wells.

54. The landfill cap, the remaining land in the Area of Institutional Controls not under the landfill cap, the

western access road and the monitoring wells installed to the Leased Property all require lateral support of adjacent land within the Leased Property.

55. Defendant's permanent physical occupation of the Leased Property has prevented and will continue to prevent plaintiff from mining sand and gravel in and reclaiming such adjacent lateral support areas.

56. Defendant's permanent physical occupation of the Leased Property constitutes and will in perpetuity constitute a taking of plaintiff's property for which defendant must pay just compensation to plaintiff, including severance damages for damage to plaintiff's remaining leasehold interest.

57. Defendant has failed to pay any compensation to plaintiff.

Count II,
Physical Taking - Easement

58. Plaintiff incorporates by reference paragraphs 1 through 57.

59. EPA, its agents, and their subcontractors, consultants or representatives have encumbered the Leased Property through the Order and subsequent judicial orders to implement the remedy at the Metamora Landfill, including but not limited to the following:

a. The Order and subsequent judicial orders require plaintiff to allow EPA and its representatives

to construct and maintain roads over the Leased Property, including to and around plaintiff's plant area.

b. The Order and subsequent judicial orders require plaintiff to allow entry to EPA and its representatives to the Leased Property.

c. The Order and subsequent judicial orders forbid plaintiff from interfering with the remedial work on the Leased Property, including removing the perimeter fencing.

d. The Order requires plaintiff to manage and control surface water runoff from plaintiff's operation so as not to interfere with the implementation and integrity of the selected remedy. Exhibit 2, Order ¶6.e (page 8).

e. The Order states that plaintiff's interference with the performance of any remedial activity will constitute a violation of the Order. Exhibit 2, Order ¶6.i (page 9). Subsequent judicial orders threaten plaintiff with civil penalties for non-compliance.

f. The Order requires plaintiff to encumber any conveyance of plaintiff's leasehold interest to ensure continued access across the Leased Property for EPA and its representatives. Exhibit 2, Order ¶6.j (page 9).

60. The provisions of the Order and subsequent judicial orders that compel plaintiff to grant EPA and its representatives access to the Leased Property and prohibit plaintiff from otherwise interfering with the remedy have encumbered plaintiff's rights under the

lease and diminished its ability to use the Leased Property.

61. The Order and subsequent judicial orders have created an easement appurtenant for access by EPA or its representatives onto and over the Leased Property for the permanent benefit of the Area of Institutional Controls taken by defendant.

62. In implementing its easement over the Leased Property, EPA and its representatives have:

a. Installed, sampled and removed monitoring wells and water supply wells.

b. Operated hundreds of gravel trucks on access roads.

c. Hauled over 200,000 yards of fill and placed such fill in the Area of Institutional Controls.

d. Cut into plaintiff's recirculation ponds and drainageways, causing the loss of thousands of gallons of water for use in plaintiff wash plant.

e. Constructed and used a storage pad on the Leased Property.

f. In general, exercised dominion over the Leased Property consistent with an easement appurtenant.

63. The Order and its implementation by EPA and its representatives constitute and will in perpetuity constitute a taking of plaintiff's property for an

easement appurtenant for which defendant must pay just compensation to plaintiff.

64. Defendant has failed to pay any compensation to plaintiff.

Prayer for Relief

Plaintiff John R. Sand & Gravel Company requests that this court enter judgment for plaintiff and against defendant the United States as follows:

A. Declare that there has been a physical taking of the plaintiff's property through permanent physical occupation by defendant;

B. Declare that there has been a physical taking of an easement appurtenant on plaintiff's property;

C. Award plaintiff compensation for its property that has been taken, in an amount of not less than $50,000,000.00, plus compound interest;

D. Award plaintiff its costs, expenses, expert witness fees, and attorney fees; and

E. Award plaintiff such other relief as this court deems proper and just.

BEIER HOWLETT, P.C.
s/
Jeffrey K. Haynes (P25140)
L. Rider Brice, III (P0741)
Attorneys for Plaintiff
200 E. Long Lake Road, Ste. 110

Bloomfiled Hills, MI 48304
(248) 645-9400

Dated: May 20, 2002

Case No. 02-509L
Hon. Emily C. Hewitt

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOHN R. SAND & GRAVEL COMPANY,
a Michigan Corporation,
Plaintiff,

The United States,
Defendant.

ANSWER TO COMPLAINT

The Defendant United States, by and through undersigned counsel, in answer to plaintiffs complaint, hereby admits, denies, responds and avers as follows;

First Defense

Defendant responds to the numbered paragraphs of plaintiffs' complaint as follows:

1. This paragraph constitutes Plaintiff's characterization of its action and thus requires no response.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

3. Defendant admits the allegations in this paragraph.

4. The allegations of this paragraph are conclusions of law to which no response is required.

5. The allegations of this paragraph are admitted to the extent they are consistent with the lease referenced therein and the court is respectfully referred to that lease which is attached to Plaintiff's complaint as Exhibit 1, and which is the best evidence of its contents.

6. Defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of this paragraph.

7. The allegations of this paragraph are admitted to the extent they are consistent with the lease referenced therein and the court is respectfully referred to that lease which is attached to Plaintiff's complaint as Exhibit 1, and which is the best evidence of its contents.

8. The Defendant admits that the quoted words are found in the lease, and the court is respectfully referred to that lease which is attached to Plaintiff's complaint as Exhibit 1, and which is the best evidence of its content. The remaining allegations of this paragraph are conclusions of law to which no response is required.

9. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

11. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

12. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

13. Defendant admits the allegations in this paragraph.

14. This paragraph contains Plaintiffs' conclusions of law regarding CERCLA, 42 U.S.C. § 9601 *et seq.*, to which no response is required.

15. This paragraph contains Plaintiffs' conclusions of law regarding Executive Order 12580, to which no response is required.

16. Defendant admits the allegations in this paragraph.

17. Defendant admits the allegations in this paragraph.

18. Defendant admits the allegations in this paragraph.

19. Defendant admits the allegations in the first sentence of this paragraph. Regarding the second sentence, Defendant admits that soil sampling and well installation occurred in areas that are outside the Metamora Landfill Site as described in EPA's February 1986 Site Characterization Report.

20. Defendant admits the allegations in this paragraph.

21. Defendant admits the allegations in this paragraph.

22. Defendant admits the allegations in this paragraph.

23. Defendant admits the allegations in this paragraph.

24. Defendant admits the allegations in the first sentence of this paragraph. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the remaining sentences.

25. Defendant admits the allegations to this paragraph.

26. Regarding the first sentence, Defendant admits that the Settling Defendants agreed to perform the remediation of Operable Unit 2. The allegations of the second sentence are conclusions of law to which no response is required; to the extent matters of facts are alleged, they are denied.

27. Defendant lacks information or knowledge sufficient to form a belief as to the truth or falsity of the allegations.

28. Defendant lacks information or knowledge sufficient to form a belief as to the truth or falsity of the

allegation that Settling Defendants had the beliefs described.

29. Defendant admits the allegations in this paragraph.

30. Defendant admits the allegations in this paragraph.

31. Defendant admits the allegations in this paragraph.

32. Defendant admits that the EPA asserted in the Order that Settling Defendants required access to the property, but denies the remaining portions of this paragraph on the basis of the fact that it mischaracterizes ¶4.m of the Order. Defendant avers that the phrase "to comply with the terms of the Consent Decree" in ¶4.m of the Order pertains to Settling Defendants and their need for access, and not to Plaintiffs.

33. Defendant admits the allegations in this paragraph.

34. Defendant admits the allegations in this paragraph.

35. Defendant admits that the long term operation, maintenance and monitoring of the remedy include the collection of samples from groundwater monitoring wells that are installed or are to be installed at various locations on the leased property outside of the Metamora Landfill Site as described in EPA's February 1986 Site Characterization Report.

36. The allegations of this paragraph are admitted to the extent they are consistent with the term of the Order referenced therein and the court is respectfully referred to that lease which is attached to Plaintiff's complaint as Exhibit 2, and which is the best evidence of its contents.

37. Defendant admits the allegations in the last sentence of this paragraph. Defendant admits that the Plaintiff sent a letter dated January 7, 1997, which stated that he "intends to comply with all the terms of the order," subject to certain conditions. The court is respectfully referred to that letter which is attached to Plaintiff's complaint as Exhibit 3, and which is the best evidence of its contents.

38. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in this paragraph.

39. In response to the allegations of this paragraph, Defendant admits that remediation work pursuant to the administrative order began in 1988.

40. In response to the allegations of this paragraph, Defendant admits that disputes arose regarding Plaintiff's compliance with the Order but is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the second sentence of this paragraph.

41. Defendant admits the allegations in this paragraph.

42. Defendant admits the allegations in this paragraph and further avers that the order entered by the Court reflects the terms agreed to by Plaintiff as a result of the negotiations referred to by Plaintiff in this paragraph.

43. Defendant admits the allegations in the first two sentences of this paragraph. The allegations of the third sentence of this paragraph are conclusions of law to which no response is required.

44. In response to the allegations of the first sentence of this paragraph, Defendant admits that a portion of the Area of Institutional Controls was free of, and remains free of, contamination. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the second sentence.

45. Defendant admits the allegations in this paragraph.

46. Defendant admits the allegations in this paragraph.

47. Defendant denies the allegations in this paragraph.

48. Defendant admits the allegations in this paragraph.

49. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of this paragraph.

50. Defendant incorporates by reference its answers to paragraphs l to 49.

51. The allegations of this paragraph are conclusions of law to which no response is required. Defendant avers that it has properly and safely closed wells no longer needed.

52. The allegations of this paragraph are conclusions of law to which no response is required.

53. The allegation of this paragraph are conclusions of law to which no response is required.

54. Defendant admits that the Area of Institutional Controls, as defined by Plaintiff in paragraph 36(d) of the complaint, and the active monitoring wells that have not been closed require some degree of lateral support of adjacent land. Defendant denies that the western access road and the inactive wells which have been closed require lateral support of adjacent land.

55. The allegations of this paragraph are conclusions of law to which no response is required; to the extent matters of facts are alleged, they are denied.

56. The allegations of this paragraph are conclusions of law to which no response is required.

57. In response to the allegations of this paragraph, Defendant admits it has paid no compensation to plaintiff.

58. Defendant incorporates by reference its answers to paragraphs 1 to 57.

59. The allegations of this paragraph are conclusion of law to which no response is required; matters of fact alleged are admitted to the extent they are consistent with the Order cited therein and the court is respectfully referred to that Order which is attached to Plaintiff's complaint as Exhibit 2, and which is the best evidence of its contents.

60. The allegations of this paragraph are conclusions of law to which no response is required.

61. The allegations of this paragraph are conclusions of law to which no response is required.

62. The allegations of this paragraph are conclusions of law to which no response is required.

63. The allegations of this paragraph are conclusions of law to which no response is required.

64. In response to the allegations of this paragraph, Defendant admits it has paid no compensation to Plaintiff.

All allegations of the complaint which have not been specifically admitted or otherwise answered are hereby denied.

Second Defense - Statute of Limitations

The complaint fails to state a claim upon which relief can be granted.

Third Defense- Statute of Limitations

The right of action alleged in the complaint did not accrue within six years before the commencement of this action, and is accordingly barred under the provisions of 28 U.S.C. § 2501.

WHEREFORE, defendant respectfully requests that this court enter an order:

1. Dismissing the complaint with prejudice;

2. Assessing the costs of this litigation against plaintiffs; and

3. Granting such other relief as the court may deem just and proper.

Respectfully Submitted

THOMAS L. SANSONETTI
Assistant Attorney General

s/
John S. Most, Virginia Bar #27176
Trial Attorney, General Litigation Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 663
Washington, DC 20044-0663
(202) 616-3353

August 21, 2002

In the United States Court of Federal Claims
No. 02-509 L
Judge Emily C. Hewitt

John R. Sand & Gravel Company,
a Michigan corporation,
Plaintiff,

v.

The United States,
Defendant,

Plaintiff's Brief Concerning:

1. Government employee or agent called as a fact witness may not testify by expert opinion

2. Accrual date of the take is May 1998

***

II. The proper date for the take is May 1998 when the fence erected around the Area of Institutional Controls completely and permanently excluded John R. Sand from mining within the area.

The determination of whether the extent of a government's occupation constitutes a permanent taking is based on the character and duration of the occupation. *Hornback v. United States*, 52 Fed.Cl. 374, 377 (2000). A physical taking is measured in the permanent destruction of the owner's right to possess, use and dispose of its property, while the duration of the government's physical presence is merely a measure of damages. See *Loretto v. Teleprompter*

Manhattan CATV Corp., 459 U.S. 419 (1982), and *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002). Only when the government's presence on a piece of property permanently destroys the owner's right to exclude others from its property has a taking of that property has [sic] occurred.

In *Hendler v. United States*, 952 F. 2d 1364 (Fed. Cir. 1991), a case similar to the present action, the Federal Circuit applied the *Loretto* permanent taking test to a CERCLA remediation matter. As part of the EPA's remedial action plan, the agency determined that a series of monitoring wells was required to monitor the contamination levels of the groundwater caused by the nearby Stringfellow Acid Pits Superfund site. *Id.* at 1367. When the EPA requested Hendler's permission to install wells on his property, he refused. The EPA then exercised its CERCLA authority and entered the property and drilled the wells without his approval. *Id.* at 1369.

Reversing the Court of Federal Claims' dismissal, the Federal Circuit directed that summary judgment be granted to Hendler on the takings claim. The key holding of the court was its rejection of the EPA's argument that since it did not completely exclude Hendler from his property its activities did not interfere with his use of his property. *Id.* at 1375-78. Relying on the *Loretto* holding that a taking occurs when a physical intrusion reaches the extreme form of a permanent physical occupation, the Federal Circuit explained that there was nothing temporary about the wells as installed, nor anything in the EPA's action or orders to suggest that they were a momentary excursion to be withdrawn (and therefore little more

than a trespass), and dismissed the EPA's claim that the intrusions were only temporary. The court found that the agency had behaved as if it had acquired an easement over the property, and therefore the occupation gave rise to a *per se* taking under the *Loretto* analysis:

> The Government does not have the right to declare itself a cotenant-in-possession with a property owner. Among a citizen's--including a property owner's--most cherished rights is the right to be let alone.

Id. at 1374. As a result, the Federal Circuit found the character of the EPA's conduct was a permanent destruction of that right, and therefore constituted a permanent taking of an easement. *Id.* at 1378.

In *McKay v. United States*, 199 F.3d 1376 (Fed. Cir. 1999), the Federal Circuit relied on *Hendler* when it found that the government's placement of monitoring wells onto private property to monitor contamination caused by the adjoining Department of Energy Rocky Flats Environmental Technology Site amounted to a taking. The court stated that:

> a physical occupation of private property by the Government which is adjudged to be of a permanent nature is a taking, and that is true without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

Id. at 1381, quoting *Hendler*, 952 F.2d at 1377. The court in *McKay* found that because the monitoring

wells intruded into the plaintiff's mineral estate, and since they were not temporary in nature and had remained in place for several years, there was clear evidence of a physical occupation by the government. *Id.*

As shown in *Scogin v. United States*, 33 Fed.Cl. 285, 291-92 (1995) (citing *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 801 (Fed. Cir. 1993)), issuance of an access ordered by EPA does not by itself does not [sic] constitute permanent physical occupation. The execution of an administrative or court order, although purporting to authorize the physical occupation of private property, does not by itself constitute the taking of a compensable property right. *Scogin, supra*, at 291, citing *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 801 (Fed. Cir.1993); *Hendler*, 952 F.2d at 1375.

As this Court found in its order denying defendant's motion for summary judgment, *John R. Sand & Gravel Co. v. U.S.*, 57 Fed. Cl. 182,187-188 (2003):

> ...'a statute that regulates activities on land, such as CERCLA, may effect a *per se* taking where the regulation necessitates a permanent physical occupation of the subject property.' *Scogin v. United States*, 33 Fed.Cl. 285, 290 (1995). However, 'the execution of an administrative or court order, although purporting to allow physical occupation of private property, does not by itself constitute a taking of a compensable property right.' *Id.* at 291 (citing *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 801 (Fed. Cir. 1993); *Hendler v. United States*, 952 F.2d 1364, 1375 (Fed. Cir. 1991)).

> Instead, the focus must be on the actual character of the government action that allegedly physically interfered with the plaintiff's property rights. See Pl.'s Suppl. Br. at 12 (citing *Loretto*, 458 U.S. at 426, 102 S.Ct. 3164). If the government action, in addition to the order, has effectively extinguished the plaintiff's right to possess, use, and dispose of its property interest, then a permanent physical taking has occurred. *Loretto*, 458 U.S. at 435, 102 S.Ct. 3164.

It is when the government actually permanently occupies a person's property that the taking occurs. The EPA's physical occupation in this case, for purposes of the accrual of John R. Sand's physical taking claim, did not commence when the administrative access order became effective in January 1997. The physical occupation occurred when John R. Sand was permanently excluded from the Area of Institutional Controls portion of its leasehold. This event occurred in May 1998 when government agents installed a fence around the Area of Institutional Controls. This fence was installed shortly after the entry of the March 23, 1998 order settling the access lawsuit between the parties. The EPA's permanent physical occupation in 1998 was further confirmed by importation of [ap]proximately 200,000 yards of fill dirt in the landfill area that commenced in 1998 and concluded in 2000.

It was not until the 1998 fence was erected that John R. Sand was physically excluded from the area for mining purposes and its interest in the sand and gravel within the Area of Institutional Controls was permanently destroyed. At this point the EPA in effect declared

itself to be the owner, or at least a co-tenant-in-possession, of the property, ousting John R. Sand from the area and destroying its rights to mine the sand and gravel. John R. Sand could no longer control or make use of the sand and gravel within the area, and more importantly, could not prevent the EPA from occupying the property. John R. Sand lost its right to be left alone. See *Hendler*, 952 F. 2d 1374. The loss of the ability to control this portion of its leasehold constituted the physical taking of John R. Sand's mineral rights for which the government must now provide compensation. Thus, the defendant's permanent physical occupation did not occur as of the effective date of the access order in January 1997, but upon the construction of the perimeter fence enclosing the Area of Institutional Controls in May 1998.

BEIER HOWLETT, P.C.

s/
Jeffrey K. Haynes (P25140)
L. Rider Brice, III (P60741)
Beier Howlett, P. C.
Attorney for plaintiff
200 East Long Lake Road,
Suite 110
Bloomfield Hills, Michigan 48304-2361
(248) 645-9400

Dated: July 8, 2004

In the United States Court of Federal Claims
No. 02-509 L
Judge Emily C. Hewitt

John R. Sand & Gravel Company,
a Michigan corporation,
Plaintiff,

v.

The United States,
Defendant.

DEFENDANT'S SPECIAL BRIEFING IN RESPONSE TO THE COURT'S ORDER OF JULY 7, 2004

Defendant hereby submits its briefing in response to the Court's order of July 7, 2004.

I. THE CURRENT STATE OF THE EVIDENCE SUGGEST PLAINTIFF'S CAUSE OF ACTION ACCRUED IN MAY, 1998.

Previously, the court determined that, for purposes of the parties' cross-motions for summary judgment, the Court would treat January 8, 1997, as the date of accrual of plaintiff's takings claim. *John R. Sand & Gravel Company v. United States*, 60 Fed. Cl. 230, 241 (Fed. Cl. 2004). It was on this date that EPA's Administrative Access Order, JX 45, took effect. The Court notes in its opinion that the order "prohibited plaintiff from 'engaging in any excavating, grading, filling, drilling, mining, storage, disposal or other construction or development' is the [AIC]" *John R.*

Sand & Gravel, 60 Fed. Cl, at 241, quoting from the Administrative Access Order at ¶6(g). Defendant submits that a January, 1997 date of taking does not appear to be fully supported by the evidence.

First, the Administrative Order, JX 45, did not explicitly bar plaintiff from the AIC.

Indeed, at that time, the AIC had not been established. Instead the order focused on the question of plaintiff's "interference" with EPA's access to the entire 154 acres. An examination of the full text of ¶6(g) is helpful. It provides:

> In the area covered by the landfill cap, as depicted in Figure 2, Respondents *shall not interfere with the implementation and integrity of the selected remedy* by, but not limited to, engaging in any excavating, grading, filling, drilling, mining, storage, disposal or other construction or development.

JX45 at 8 (emphasis added). Briefly stated, ¶6(g) prohibited plaintiff from *interfering* with the remedy by mining or by other specified activities, but this language appears not to prohibit John R. Sand from mining in a manner that does not interfere. Second, ¶6(g) applies to "the area covered by the landfill cap," yet at the time, no cap bad been constructed. This provision is thus somewhat unclear. Moreover plaintiff's claim in this case was for a physical taking, not a regulatory taking. The Administrative Access Order had no physical impact.

More significantly for purposes of an analysis of when plaintiff's cause of action accrued, plaintiff did not obey the Administrative Order. Instead, plaintiff continued to block EPA and its agents from entering the property, engaging in numerous acts of interference over the subsequent years. *See* Defendant's June 15, 2004 *Memorandum of Contentions of Law and Fact* at 12-13.

Because plaintiff's acts of interference eventually forced work on the environmental remediation of the Site to stop, in early 1997 the United States eventually filed a complaint in United States District Court, seeking an injunction against plaintiff. On March 23, 1998, the District Court entered an order enjoining plaintiff "from interfering" with EPA or preventing them "from entering on or at the Metamora Landfill Site." But similar to the previous administrative order, that order did not specifically bar plaintiff from the AIC.

Because of plaintiff's acts of resistance to the efforts of EPA to keep him outside the fencing that existed at the Site from 1992 forward, based on the current state of the evidence it appears that it was not until May 1998 when the fence was re-aligned to enclose only the 39-acre area immediately around the landfill portion of the Site that plaintiff was clearly and permanently excluded from the AIC. DX 248.

Dated: July 8, 2004

THOMAS L. SANSONETTI
Assistant Attorney General

s/
John S. Most, Virginia Bar #27176
Trial Attorney, General Litigation Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 663
Washington, DC 20044-0663
(202) 616-3353

02-509L
In the United States Court of Federal Claims

John R. Sand & Gravel Company,
a Michigan corporation,
Plaintiff,

v.

The United States,
Defendant.

Stipulated Facts

1. Plaintiff leased the property described in the lease for mining purposes on August 1, 1969 for a term of 50 years in accordance with the terms of the lease (JX1).

2. Plaintiff's lessor, Russell Parrish, is deceased. The Estate of Russell Parrish now owns the property.

3. What is known as the Metamora Landfill Superfund site is located on the northern portion of the plaintiff's leasehold.

4. Drum Area 1 is located in the south central portion of the site; Drum Area 4 is located in the northwest portion of the site.

5. Michigan placed the Metamora Landfill on its Act 307 list for contaminated sites.

6. In 1984 EPA placed the Metamora Landfill site on its National Priority List of Hazardous Waste Sites.

7. The investigation and remediation of the Metamora Landfill site was initially State-led by the MDNR. The State contracted with E.C. Jordan to conduct various investigations and studies from 1986 to 1990 to evaluate the contamination at the site and to recommend potential remedies. The State later contracted with Chemical Waste Management, which removed, transported, and disposed of drums from Drum Area 1 and Drum Area. 4. The State did not complete the removal and disposal of all of the drums from Drum Areas 1 and 4.

8. EPA issued a Record of Decision for the Metamora Landfill in September 1986 (JX2).

9. EPA issued a second ROD in September 1990 concerning the remediation of the site (JX5).

10. The 1990 ROD called for a cap over the landfill, a pump and treat system for contaminated groundwater, and deed restrictions.

11. The Metamora Landfill Settling PRP Group (MLSPG) entered into a consent decree with EPA in 1993 (JX10).

12. The consent decree was judicially approved. *United States v BASF-Inmont Corp.*, 819 F. Supp. 601 (E.D. Mich 1993).

13. Plaintiff is not a party to the consent decree.

14. EPA, with the State of Michigan's concurrence, amended the 1986 ROD in August 1996 (JX16).

15. The MLSPG relocated approximately 40,660 cubic yards of soil from Drum Area 1 and a soil staging area to the south face of the landfill, which was later covered by the landfill cap.

16. The landfill cap system remedy consists of (a) a cap extending to approximately the edge of the waste, (b) a gradual slope from the top of the cap to permit surface water to run down and away from the landfill mass and to prevent erosion, (c) stormwater ditches and retention pond, (d) access roads, (e) site-security fence to control access, (f) installation, monitoring, and maintenance of a landfill gas venting system, and (g) implementation of access/deed restrictions. This remedy was approved by the EPA and the MDEQ.

17. On December 18, 1996, EPA issued to plaintiff an administrative order directing compliance with a request for access to implement the remedy (JX45).

18. On December 18, 1996, EPA designated the MLSPG as EPA's representatives for the purpose of entry on, and access to, the property to implement the remedy (JX18).

19. EPA, with the State of Michigan's concurrence, amended the ROD on September 27, 2001, which provided for, among other things, a Monitored Natural Attenuation remedy for the contaminated groundwater (DX224).

20. In May 1998 the fence was realigned to create an Area of Institutional Controls. This fence completely excluded plaintiff from the Area of Institutional Controls.

21. In November and December 2003, the MLSPG relocated portions of the 1998 fence around the Area of Institutional Controls to reduce the size of the Area of Institutional Controls (JX 41, 42).

22. The remedy at the Metamora Landfill is designed to exist for a minimum of 30 years.

23. Metamora Township enacted its Soil Removal Ordinance No. 34 on May 22, 1996 (JX 15).

24. Plaintiff entered into a consent judgment with Metamora Township dated July 13, 1999 (JX 28).

25. Metamora Township issued a soil removal permit to plaintiff on June 6, 2003 to mine a portion of the property (JX39).

Respectfully submitted,

Beier Howlett, P.C.

s/
Jeffrey K. Haynes
L. Rider Brice, III
Beier Howlett, P. C.
Attorney for plaintiff
200 East Long Lake Road,
Suite 110
Bloomfield Hills, Michigan
48304-2361
(248) 645-9400

s/
John S. Most, Trial
Attorney
Susan V. Cook, Sr.
Attorney
Steven D. Bryant,
Trial Attorney
General Litigation
Section
Environment &
Natural Resources
Division
United States

Department of
Justice
P.O. Box 663
Washington, DC
20044-0663
(202) 616-3353

Dated: July 9, 2004